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November 30, 2011

*Via ECFS*

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

Yesterday, my colleague, Gerry Waldron, and I met with Angela Kronenberg, Legal Advisor to Commissioner Clyburn, on behalf of our client, Portfolio Recovery Associates, LLC, in connection with the above-referenced docket. In the meeting, we discussed the history and consequences of the Commission's decision to treat predictive dialers as "automatic telephone dialing systems" and "autodialers" under its rules, as well as the benefits that would result through increased productivity, lower costs and quality control if predictive dialers were treated differently. We explained that the Commission can clarify its earlier statements on predictive dialers so as to permit their broader use in a manner consistent with the core policy objectives of the Telephone Consumer Protection Act and the FCC's rules. We also provided Ms. Kronenberg with the attached document.

Pursuant to the Commission's rules, we are filing a copy of this letter in the above-referenced docket. Please contact the undersigned if you have any questions.

Respectfully submitted,



Yaron Dori

cc: Angela Kronenberg (via e-mail)  
Gerry Waldron

Enclosure

**PORTFOLIO RECOVERY ASSOCIATES, LLC  
CG DOCKET NO. 02-278**

**The definition of “automatic telephone dialing system” and “autodialer” can and should exclude predictive dialers where their use does not implicate core TCPA and FCC policy objectives.**

**This issue is ripe for action under Executive Order 13579 because the existing approach:**

- (1) has been affected by changes in technology or new scientific research or changes in market structure;**
- (2) has a disproportionate or undue burden on particular entities, has caused unintended negatives effects, or could result in net benefits to the public if modified; and**
- (3) has been subject to frequent requests for waivers by affected stakeholders or been identified by the public as needing revision.**

**1. Dialing technology today differs markedly from the technology in place when the TCPA was enacted.**

- The TCPA and the FCC’s rules define an “automatic telephone dialing system” and “autodialer” as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”
- In 1991, Congress was concerned primarily with random or sequential dialing and line seizures. Later, in 2003, technology had advanced but the FCC continued to interpret the terms “automated telephone dialing system” and “autodialer” to subsume predictive dialers, largely on policy grounds. This conclusion was reiterated by the FCC five years later in *ACA International*.
- Predictive dialers transmit calls to *pre-programmed* numbers, not “using a random or sequential number generator.” They also do not dial randomly- or sequentially-generated numbers. Relying on the term “capacity” to bridge these gaps overreaches. With the right app, an iPhone has the *capacity* to do just about anything, but that does not make it an autodialer. The same should be true for predictive dialers.
- Treating predictive dialers as autodialers has unleashed a torrent of unnecessary and destructive class action litigation across industries, including the debt collection industry.

**2. The current approach places an undue burden on entities that want to “increase[] productivity and lower costs” when reaching out to consumers to provide them with beneficial information.**

- Predictive dialers are beneficial to businesses and consumers. They allow businesses to reach consumers in an accurate, efficient and quality-controlled manner.
- In the debt collection context, predictive dialers help ensure compliance with the Fair Debt Collection Practices Act (“FDCPA”) and other federal and state requirements that govern debt collection activity.
- The mobile phone has become the only way to reach many consumers, especially those who have “cut the cord.” At the same time, mobile phone usage costs have declined dramatically. Debtors (whether in the tax, government-backed loan, or private sector context) can be especially difficult to reach through landlines.
- The premise that predictive dialers unfairly shift costs to consumers is no longer apt. In fact, restrictions on predictive dialers lead to increased operating costs that ultimately are borne by consumers.

- Consumers would benefit from the efficient delivery of informational messages across industries, including financial- and security-related fraud alerts, school cancellations, road closures, etc.

**3. The current approach has been subject to frequent and public requests for revision.**

- The current treatment of predictive dialers was challenged in 2003 and five years later in *ACA International*.
- A number of parties have raised concerns over the current approach in the pending *FNPRM* seeking to reconcile the FCC's rules for prerecorded calls with those of the FTC.
- Legislation was recently introduced (H.R. 3035) to remedy this issue.

Fortunately, the FCC can address this issue without legislation and consistent with its core policy objectives.

- **The FCC cannot alter the definition of “automated telephone dialing system” in Section 227(a)(1) of the Communications Act.**
- **But the FCC can *clarify* that its own application of that definition to predictive dialers does not apply in certain contexts, such as debt collection.**
- **The FCC has long understood that debt collection calls do not implicate the same policy considerations as telephone solicitation, telemarketing, and even most other non-commercial calls. Debt collectors:**
  - cannot secure the prior express consent of call recipients;
  - possess few reliable alternatives to reaching debtors; and
  - are bound by the requirements of the FDCPA, which empowers debtors to, among other things, cease all communications from debt collectors, including communications by phone.
- **There are ample policy reasons to clarify the extent to which the definition of “automated telephone dialing system” should not apply to predictive dialers in other contexts as well.**
  - “Telephone solicitation” calls to mobile phones already are subject to the FCC’s do not call rules and would be subject to National and entity-specific opt out requirements.
  - Informational calls to mobile phones that annoy, abuse, threaten or harass consumers already are subject to prohibition under 47 U.S.C. § 223.
  - The generally accepted industry practice for SMS transmissions is to include an opt out.
  - Informational calls typically are transmitted within the context of an existing business relationship where the key incentive is to treat consumers properly.